IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 199/2004

Mr. Radhakant R. Pai Kane,
son of late Ramnath Pai Kane,
of major age, residing at H.No.641,
Mahalsa Sadan, Opp. Swastik Industries,
Aquem, Alto, Margao, Goa. ..... Appellant.

V/s.

1. Mr. Pravin Dattatray Dessai,
son of Dattatray Dessai, of major age,
residing at H.No.A/2, Elvira Co-op.
Housing Society Ltd., Aquem, Margao, Goa

2. Smt. Prajakta Pravin Dessai,
of major age, residing at H.No.A/2,
Elvira Co-op. Housing Society Ltd.,
Aquem, Margao, Goa. ..... Respondents.

Mr. Sudin Usgaonkar and Ms. G. Kale, Advocates for the Appellant.

Mr. V. A. Lawande and Mr. A. Kakodkar, Advocates for the Respondents.

CORAM : P.V. KAKADE, J.

Date of reserving the Judgment :
29th September, 2006.

Date of pronouncing the Judgment :
4th October, 2006.

J U D G M E N T :

The unsuccessful plaintiff has preferred this appeal against the

Judgment and Order passed by the Civil Judge, Sr. Division, Margao, dismissing his suit and decreeing the counter claim of the respondents-defendants.

2. I have heard the learned Counsel for both the parties. Perused the record.

The appellant-plaintiff filed the suit for recovery of the amount of Rs. 1,86,476/- along with interest at the rate of 16 % per annum on the said amount from the date of filing of the suit till date of the decree and at the same rate till realisation of the amount. The decree was sought against the defendants No.1 and 2 jointly and severally. The plaintiff came with a case that he owned a tipper truck of Telco make. It was acquired by the plaintiff after obtaining loan from the Goa Urban Co-operative Bank Ltd. The loan advanced by the said Bank was Rs.4,08,000/- under account No.032S27100244 in folio No. MS 22/095 with interest at the rate of 16 % per annum with quarterly rests. The said loan was advanced to the plaintiff on 9.3.1994 and all the dues including the interest were to be paid by the plaintiff to the Bank by end of March, 1999. Sometime, in the last week of May, 1995, or may be in the first week of June, 1995 the defendant No.1 approached the plaintiff with a proposal to purchase the said truck. The plaintiff told the defendant No.1 that the price to be paid for sale of the said vehicle should be a minimum of Rs.4,80,716/-, out of which a sum of

Rs.3,39,061/- had to be paid in the account of the plaintiff in the Goa Urban Co-operative Bank Ltd., Margao Branch with whom the said vehicle was hypothecated on account of the term loan obtained by the plaintiff for acquiring the said vehicle. The plaintiff also informed the defendant No.1 that the suit vehicle and the ownership of the suit vehicle would not be transferred unless all the dues under the said loan account with the said Bank were paid. Further, the defendant No.1 also informed that as on 12.5.1995, a sum of Rs.3,39,061/- was due and payable to the said Bank by the plaintiff under the said loan account and further from 12.5.1995 onwards further interest was also due. It was also informed to the defendant that as per the terms of loan with the said Bank, the plaintiff had to pay a fixed instalment every month, as also timely fulfill the other terms of loan including the rate of interest, the terms of payment of interest etc.

The defendant no.1 expressed his inability to pay the entire price at one time but, instead the defendant No.1 offered that the loan against the said vehicle then standing in the name of the plaintiff be continued and further suggested that he would be given time to pay the price of Rs.4,80,716/- in 47 equal monthly instalments of Rs.10,228/- and that he would also timely pay to the plaintiff the interest charged by the plaintiff's Bankers against the said term loan account, additionally. The

defendant also offered to independently pay the premia of insurance of suit vehicle and taxes and other dues payable to the transport authorities and other authorities against the said vehicle. The defendant No.1 also insisted the immediate delivery and possession of the said vehicle and the ownership of the vehicle was agreed to be transferred in the name of the defendant No.1, only after clearance of the entire dues payable to the plaintiff as per his offer. Therefore, as per the agreement between the parties, the defendant was required to pay to the plaintiff price of the said vehicle in the following terms :

(a) a total amount of Rs.4,80,716/- payable in 47 monthly instalments of Rs.10,228/- each;

(b) whatever interest that would be charged by the Bank on the instalments on the dates of interest that was falling due;

(c) as per the terms mutually settled between the plaintiff and the defendant No.1, the defendant No.1 had also to deposit a sum of Rs.25,000/- which shall not bear any interest and shall be adjusted against the sale price.

As per the said terms, Agreement dated 7.6.1997 was drawn and executed between the plaintiff and the defendant No.1 and the possession of the said vehicle was handed over by the plaintiff to the defendant No.1 on 7th June, 1995. After taking possession of the said truck,

the defendant did not bother to pay the instalments as well as the interest due and payable to the Bank , in time, and there were arrears left to be paid by the plaintiff, whenever certain amounts were to be paid. The total interest due and paid under the said account to the said Bank from 7.6.1995 to 1.2.1999 was Rs.1,10,907/-, details of which are given in paragraph 15 of the plaint. Till the end of the financial year 1998-99 ie. as on 31.3.1999, the defendant No.1 paid to the plaintiff a total sum of Rs.4,29,000/-. Further the defendant also paid to the plaintiff on 9.9.1999 a sum of Rs.26,716/-. Therefore, as on 1.2.1999, the defendant became due and payable to the plaintiff a sum of Rs.1,62,623/-, as detailed in para 19 of the plaint and, therefore, averred that the plaintiff was also entitled to receive from the defendant No.1 interest at the rate of 16 % per annum which is the rate charged by the said Bank to the plaintiff on the lending of the said amount from 2.2.1999 till realisation. The defendant No.1 has paid to the plaintiff an amount of Rs.26,716/- on 9.9.1999. The position of the amount due and payable by the defendant No.1 to the plaintiff as on 9.9.1999 was as per the details in para 21 of the plaint, which showed that the balance payable by the defendant No.1 was Rs.1,51,590/- which the defendant did not pay and hence the suit was filed against the defendant No.1 and his wife defendant No.2 as she was also jointly liable to pay the amount under the personal law, applicable to Goans. The cause of action

for the purpose of the suit is arisen on the date of last payment made by the defendant No.1 in favour of the plaintiff i.e. on 9.9.99 and also again when the defendant No.1 refused to pay the said amount vide reply of his Advocate's notice dated 29.7.2000. Hence, the suit for recovery of the amount of Rs.1,86,476/- along with interest at the rate of 16 % per annum through out.

2. The defendants contested the suit, inter alia, denying the liability to pay the said amount to the plaintiff, as alleged. It was the crux of the defence of the defendants that though the defendants agreed to pay the plaintiff interest charged by the Bank in addition to the instalments as mentioned in clause 3 of the agreement, the word “instalments” as mentioned in clause 3 of the agreement does not include the principal amount as well as the interest amount. It is the case sought to be made out on behalf of the defendants that the intention of inclusion of para 5 of the agreement was that if at all Bank increases the interest rate then the burden was to be borne by the defendant No.1 and not by the plaintiff and, it was never intended by the parties that the defendant No.1 was to pay the Bank interest, firstly as per instalment mentioned in clause 3 of the agreement and again to pay it as per contents of clause 5 of the agreement. The defendants also challenged the suit on the ground of bar of limitation

submitting that the suit was barred by law of limitation.

The defendants also filed counter-claim claiming that the ownership of the truck is not transferred and registered in the name of the defendant No.1 inspite of the fact that as per the Agreement dated 7.6.97 the entire amount was paid by him to the plaintiff. On such and other grounds, the suit was sought to be dismissed; whereas the counter-claim was sought to be decreed.

3. The learned trial Judge, on the basis of the pleadings and evidence on record, proceeded to hold that the plaintiff had failed to prove that he was entitled to recover from the defendants jointly and severally the sum of Rs.1,86,476/- with interest at the rate of 16 % per annum as prayed for. It was further held that the defendants had proved that he was entitled for the mandatory injunction against the plaintiff to sign the necessary documents to transfer the vehicle in his name and to that extent, the counter-claim came to be decreed. Hence, the present appeal. At the outset, it may be noted that it is an admitted as well as evident position between the parties that the suit agreement dated 7.6.95 came to be executed between them. It is also admitted by the defendants that the contents of clauses 3 and 5 were part and parcel of the agreement between the parties. This aspect is also admitted by the defendants in their

pleadings i.e. the written statement at Exhibit-10. In fact, a perusal of the written statement of the defendants-respondents shows that they have admitted the contents of paras 13, 15, 16 and 17 of the plaint and in para 25 of their written statement they have further categorically made statement that they did agree by virtue of the said agreement to pay the plaintiff interest charged by the GUCB Ltd., **in addition** to the instalments as mentioned in clause 3 of the agreement (emphasis supplied), however, they have tried to explain that the intention behind inclusion of clause 5 in the agreement was to the effect that if at all the Bank increases the interest rate then the burden was to be borne by the defendant No.1 and not by the plaintiff. If the pleadings are to be relied upon, it is the defendants' case that it was never intended by the parties that defendant No.1 was to pay the bank interest, firstly as per intalments mentioned in clause 3 of the agreement and again to pay it as per the contents of clause 5 of the agreement.

Now, it is significant to note that the defendant No.1 who was cross examined has given total go-by to his version of the defence in the written statement and has tried to make out a totally different case in his defence. Though he categorically admitted in the course of cross examination that he had signed the said agreement, he had stated he did not read it and has not read the said agreement even till the date when his

cross examination was held. He has further stated that after he got acquainted with the contents of the said agreement, he found that the agreement is not as per the terms agreed between him and the plaintiff. According to him, although the agreement did refer to the time on which each of the 47 instalments were to be paid by him, this was not informed to him by anybody. He has also stated that though it was the condition of the agreement that he was to pay interest payable to the Bank on the loan that was taken by the plaintiff against the said truck, it was never agreed between him and the plaintiff in such a manner.

4. In other words, there is no doubt whatsoever that the pleadings of the defendants are in total variance of the contents of the written.

5. In this connection, the learned Counsel for the appellant-plaintiff sought to put reliance on the case of ***Ram Sarup Gupta (dead) by L.Rs., v. Bishun Narain Inter College and ors.,*** AIR 1987 SC 1242 wherein the Apex Court has categorically laid down that it is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. The object and

purpose of pleading is to enable the adversary party to know the case it has to meet. In order to have a fair trial, it is imperative that the party should state the essential material facts so that other party may not be taken by surprise. In the present case before us, when the pleadings of the defendants categorically show that not only the execution and the contents of the suit agreement were admitted by him, it was not permissible for him to vary his defence in the course of his cross examination and substantive evidence. While trying to run away from the earlier stance, the defendant No.1 stated that he was not aware of the contents of the agreement and did not read the suit agreement before signing it. In other words, he wanted to make out a case of the plaintiff's obtaining of the agreement from him by fraudulent means, which aspect cannot be allowed to be introduced by the defendant in the course of his cross examination.

6. Moreover, the provisions of Section 91 of the Evidence Act could also necessarily be invoked in this case, which relate to exclusion of oral by documentary evidence. It stipulates that when the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of

such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the said provisions. It is also to be noted that there are two exceptions to this rule. However, the defence of the present defendants does not fall within the said two exceptions. Similarly, if we peruse the provisions of Section 92 of the Evidence Act, it also makes it clear that the defendants are precluded by law to introduce any other theory, as was sought to be introduced in the course of cross examination when the terms of contract are not only specific between the parties, but are categorically admitted with regard to its execution and contents, in the written statement itself.

7. From the evidence on record, it is seen that the plaintiff has produced the statement of Bank showing that the payments were made by him in instalments, each instalment being of Rs.10,228/-, which included the interest amount. Taking advantage of this aspect, the learned Counsel for the respondents-defendants tried to make capital out of it and submitted that the statement itself shows that the payments which were made by the defendants to the plaintiff were identical i.e. instalment of Rs.10,228/- and the total amount was paid by him to the plaintiff to the extent of Rs.4,80,716/- and, therefore, nothing was payable by the defendants to the plaintiff and the plaintiff was taking undue advantage of the agreement

between the parties of which words were twisted by him. In fact, on careful consideration of the agreement between the parties, it is seen that the real story is totally different. For that purpose, we have to go to the agreement itself. Clause 3 of the suit agreement reads thus :

> 3. The party of the second party shall make the payments towards the bank liability in 47 monthly instalments of Rs.10,228/- each.

Similarly, clause 5 of the suit agreement reads thus :

> In addition to the above instalments, the interest charged by the Goa Urban Co.op. Bank Ltd., from whom the party of the first part has taken loan will be paid by the party of the Second part to the party of the First part in instalments. On getting clearance from the Goa Urban Co-op. Bank Ltd., the Tipper Truck will be transferred in the name of the party of the second part.

If these two clauses are read in juxtapose, it is seen that clause 3 stipulates that the defendant was liable to pay the amount which was due towards the Bank liability in 47 monthly instalments of Rs.10,228/- each. Clause 5 stipulated that, in addition to the said 47 instalments, interest charged by the Bank will be paid by the defendants to the plaintiff. Therefore, the liability which was accepted by the defendant No.1 at the foot of the suit

agreement was not only to pay the amount of 47 instalments at the rate of Rs.10,228/- but, in addition to that also the interest amount as per clause 5 of the said agreement. It was submitted on behalf of the respondents-defendants that the said theory of “double liability” cannot be read in the agreement itself. However, it is clear that the plaintiff who, obviously, is a businessman, did not offer the said vehicle as charity to the defendant No.1 without making his profit in the transaction and, therefore, in my considered view, clause 5 of the agreement was not only deliberate, but with the consent of the defendant No.1 himself, so as to look after the financial interest of the plaintiff. Therefore, the interpretation sought to be made on behalf the defendants that the suit agreement cannot be accepted, especially when the execution of the agreement and contents thereof, is an admitted position and, therefore, the defendants' plea cannot be taken into account due to bar of Sections 91 and 92 of the Evidence Act.

8. A perusal of the Judgment of the lower Court shows that the learned trial Judge has handled the dispute in a most casual and cursory manner while dealing with the instalment which was sought to be paid by the defendants at the rate of Rs.10,228/-, including the interest and the principal amount and, therefore, the defendants' liability was to pay the amount as per clause 5 of the agreement did not arise. This observation, in

my considered view is totally wrong and contrary to the legal position as well as the evidence on record and, therefore, has to be set aside.

9. The learned Counsel for the respondents further submitted that the suit was barred by law of limitation. However, it is seen that the cause of action for the suit indeed arose within a period of three years after the last payment was made by the defendant No.1 on 9.9.99. Obviously, it arose again when the legal notice was served on the defendant No.1 and he refused to pay the amount vide reply of his Advocate dated 29.7.2000 and, therefore, it cannot be said that the suit was barred by limitation. Consequently, the counter-claim which is made by the defendants and decreed by the trial Court also is required to be interfered with and dismissed in view of the observations made herein before in the body of the Judgment.

10. The learned Counsel for the respondents-defendants brought to my notice that a separate appeal should have been filed by the present appellants against the order of the trial Court passing the decree on counter claim. However, in my considered view, that difficulty can be corrected by calculation and consequent direction of additional court fee for the purpose of said appeal, especially when the substantive appeal is filed and court fee

thereon has been paid.

11. In the result, I hold that the reasoning adopted by the trial Court is erroneous and, therefore, cannot be accepted in law. The appeal is, accordingly, allowed, with no order as to costs.

(A) The plaintiff's suit is decreed in terms of prayer Clause (a) of the plaint;

(B) The Order passed by the trial Court decreeing the counter-claim is also set aside and the counter-claim stands dismissed with no order as to costs; and

(C) Office to calculate the additional Court fee, if any, to be assessed on the appellant-plaintiff for the purpose of appeal against the decree on the counter-claim which was passed by the trial Court.

P.V. KAKADE, J.

ssm.